

October 17, 2003

VIA ELECTRONIC COMMENT FILING SYSTEM

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: *Ex Parte Presentation*
MB Docket No. 02-230

Dear Ms. Dortch:

It has come to our attention that some parties interested in the above-referenced proceeding have proposed to the Media Bureau an exemption from the Broadcast Flag for news and/or public affairs programming.¹ We write to state the collective opposition to such an exemption of the National Football League, the National Hockey League, the National Collegiate Athletic Association, the PGA TOUR, Inc. and the Ladies Professional Golf Association (collectively, "Professional and Collegiate Sports").

In Comments and Reply Comments filed in this docket, a larger group of Professional and Collegiate Sports expressed its support for the Broadcast Flag as an essential precondition to content owners making broadcast programming widely available in a digital format.² Professional and Collegiate Sports, which today make available a significant percentage of some of the most popular programming on free, over-the-air television, predicted that, absent such a redistribution control regime, they would be forced to migrate more content to conditional access

¹ *NBC Stations Fret Flag Loophole*, MULTICHANNEL NEWS, October 13, 2003, at 26 (citing the Consumer Electronics Association as a proponent of such an exemption).

² See Joint Comments and Joint Reply Comments of NFL, Baseball, NBA, NHL, WNBA, NCAA, PGA and LPGA, filed December 6, 2002, and February 21, 2003 ("Comments" and "Reply Comments," respectively).

media, such as cable and satellite.³ Among the issues addressed in Professional and Collegiate Sports' filings was the importance of the Broadcast Flag in protecting secondary markets for sports programming, such as highlight shows and "classic" past games or events.⁴

As an initial matter, the definition of the "news" or "public affairs" items within such an exemption would be administratively unworkable for the Commission, all affected industries, and consumers. Consumer interests could be expected to argue that Professional and Collegiate Sports' content is as much "news" as is a President's State of the Union speech. Of course, this argument is specious, as telecasts of Professional and Collegiate Sports' televised product are proprietary and protected by copyright law, as are news programs written, produced, directed and distributed (often at great expense, and using high-priced on- and off-air talent) by television broadcasters. (These telecasts also provide content for controlled sports programming through alternative distribution methods – i.e., Internet-based services – in which sports entities have invested significant resources.) Unfortunately, any prohibition on including a Broadcast Flag in "news" programs will involve content-based considerations as to whether particular programs are "news," and will draw the Commission and the affected parties into an administrative quagmire of ill-defined guidelines. This lack of bright lines in such an exemption exemplifies exactly the kind of regulatory uncertainty that will lead content owners to hold back digital programming, thereby inhibiting the digital transition. Further, since the Broadcast Flag permits digital content to be recorded and distributed within the home environment, the argument that the Flag somehow will impede public discourse by limiting copying of news events has a weak factual predicate.

More fundamentally, if a "news" exemption were somehow distorted to include telecasts of sporting news, the implications for the economic models around which free, over-the-air telecasts of sporting events have been built would be dire. Professional and Collegiate Sports' business models uniquely depend on local and regional telecasts. These telecasts generate regional interest in particular teams and athletes but also give incentives for fans to attend games. For all of the reasons articulated by Professional and Collegiate Sports in their Comments and Reply Comments, the lack of a redistribution control mechanism applicable to televised sporting events would upset these established business models. Television rights fees, ticket sales, regional fan interest, blackout policies and the Commission's sports blackout rule -- all would be substantially undermined if digital broadcast sports content can be redistributed without limitation. Application of an exemption for news and public affairs programming could also

³ Comments at 11; Reply Comments at 12.

⁴ Comments at 8-9.

viability of newer economic models, such as NBA TV and the Webcasts already offered or in development by several of the sports leagues.⁵

Further, while much sports programming is broadcast live, the valuable secondary markets for Professional and Collegiate Sports' content, such as highlight shows and telecasts of "classic" sporting contests, would be particularly undercut by a broad-based exemption that arguably could include broadcast sports content. Indeed, an entire cable channel – "ESPN Classic" – is devoted to repeat showings of famous sporting events. One purported justification for such an exemption is that news programming has a lower resale value than, say, Hollywood movies, and thus exempting news and public affairs from the Broadcast Flag would have little economic effect. This argument is flatly contradicted by the demonstrated commercial value of sports highlights in such shows as "This Week in Baseball," "Inside the NFL" and "NBA Inside Stuff."⁶

If the Commission does adopt some variation of a news and/or public affairs exemption to the Broadcast Flag rules, Professional and Collegiate Sports urge the Commission to clarify that telecasts of professional and collegiate sporting events and sports-related programs are not within the scope of such an exemption. Telecasts of games and after-the-fact highlights have substantial commercial value and deserve the same protection as is afforded Hollywood movies. If an exemption is adopted, the Commission should provide regulatory certainty by clarifying that it does not include sports programming in its Order and not wait for petitions for reconsideration or clarification to address this issue.

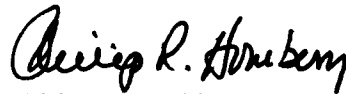
In sum, Professional and Collegiate Sports respectfully urge the Commission to reject an exemption from the Broadcast Flag's protections for news and public affairs because, at best, such an exemption poses unmanageable administrative concerns and, at worst, undercuts the

⁵ See Comments at 9-10 for more detail on these newer ventures.

⁶ Comments at 8-9.

very incentives of content owners that the Broadcast Flag was created to protect. In the event an exemption is adopted, the Commission should clarify that the proprietary content of Professional and Collegiate Sports is not within the scope of the exemption.

Sincerely,



Philip R. Hochberg

Paul W. Jamieson

*Counsel to National Football League, National
Hockey League, National Collegiate Athletic
Association, PGA TOUR, Inc., Ladies Professional
Golf Association*

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Paul Gallant, Office of Chairman Powell
Stacy Robinson Fuller, Office of Commissioner Abernathy
Jordan Goldstein, Office of Commissioner Copps
Catherine Crutcher Bohigan, Office of Commissioner Martin
Johanna Mikes, Office of Commissioner Adelstein
W. Kenneth Feree, Media Bureau Chief
Rick Chessen, Associate Media Bureau Chief